No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN HAYMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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This reply brief will deal with certain points raised by respondent which were not treated in petitioner's main brief, or for which a more elaborate discussion now seems advisable. The failure in this brief to meet other points made by respondent is of course not to be taken as a concession of their validity.

Respondent contends in Point I that the motion procedure of § 2255 is inapplicable and inadequate for cases in which factual issues not determinable on the record are raised by prisoners confined outside the district in which they were tried, and in Point II that the inadequacy of the

procedure requires its invalidation as a suspension of habeas corpus in violation of Article I, Section 9, Clause 2.

I

Section 2255 should be construed as applicable in this kind of case

The statutory argument advanced by respondent seemingly has two facets: (a) § 2255 is inapplicable because it was not *intended* to apply to cases requiring a factual hearing brought by prisoners confined outside the district, and (b) the procedure is necessarily inadequate in such cases.

A. Section 2255 was intended to be applicable to cases brought by prisoners confined outside the District and requiring a factual hearing

Respondent argues that the Judicial Conference did not intend the motion to be applicable in cases calling for production of the prisoner at a hearing. He asserts that the Conference contemplated a "balance of remedies" (Br. 18) under which "the motion procedure yields to habeas corpus when disputed issues of fact entitle the prisoner to be brought in" (Br. 17). He argues that "there is substantial scope for the employment of the motion procedure" in "motions to correct or reduce sentence, motions resting on allegations that are controverted by the record, motions resting on an unsound legal contention" (Br. 14–15). But as to cases presenting "disputed issues of fact" (Br. 15), he argues that

the motion remedy is frequently, or usually, or almost always inapplicable (Br. 15–18). And he argues that to produce the prisoner in the motion court in such cases "would be in substance a transfer of habeas corpus to the distant sentencing court—a result plainly not contemplated or desired" (Br. 17). He cites nothing in the Judicial Conference materials to support this view. Indeed, those materials are wholly at variance with it.

In the first place, as we have pointed out in our main Brief, the Conference intended to substitute the motion procedure for habeas corpus in substantially all cases involving convictions in federal courts (Govt. main Br. p. 31). The reports of the Conference are unequivocal as to this. The first report of the Habeas Corpus Committee to the conference proposed "that the question as to the constitutional validity of the trial should be raised in the trial court on motion" and that habeas corpus in another court "should not be allowed except in those rare cases where the ends of justice imperatively so require." (Quoted at p. 24, Govt. main Br.) The memorandum submitted by Judge Stone to the Chairmen of the Congressional Committee similarly stated that "The motion remedy broadly covers all situations where the sentence is 'open to collateral attack,'" and that habeas corpus was to be permitted only in "exceptional instances" (App., p. 137).[1] And

[1] "Appendix" as used herein means the Appendix to the main Brief for the United States.

the memorandum of Judge Parker to the circuit and district judges in 1947 repeats the statement that habeas corpus was to be permitted only in "rare cases" (App., p. 167).[2] These statements are totally inconsistent with a theory that would make the motion remedy inapplicable in every case in which the presence of the prisoner at a hearing was necessary to afford adequate relief. Such cases could certainly not be dismissed as "rare" or "exceptional."

In the second place, respondent's theory disregards the fact that the proposals resulting in Section 2255 were supported in the Conference largely because of the need for a new procedure where a trial of facts was necessary. This is shown beyond question in the statements from the first report of the Habeas Corpus Committee, quoted at pages

[2] The Committee on Habeas Corpus subsequently reported to the Conference that (App., p. 182):

"Pursuant to direction of the Judicial Conference at the special meeting held April 21 and 22, 1947, your Committee sent out to all the Circuit and District Judges of the United States the proposed statutes relating to Habeas Corpus which had been considered by the Conference. The Committee has heard from a large number of judges, practically all of whom approve most of the features of the proposed statutes, but a number of whom expressed themselves as opposed to the provision for a three judge court in certain cases. A number offered constructive suggestions of value. The Judicial Conference of the 1st, 2d, 3d, 5th and 10th Circuits endorsed the proposed legislation. The Conferences of the 7th, 8th and 9th Circuits endorsed it except as to the three judge court provisions, which they opposed."

22–24 of our main Brief; in the letter of Mr. Chandler to the Congress "in behalf of the Judicial Conference" (Appendix, p. 106); in the memorandum of Judge Stone to the Committees of Congress, quoted at pages 27–29 of our main Brief (see also Appendix, pp. 137–138); in the 1947 report of the Habeas Corpus Committee, quoted at p. 25 of our main Brief; and in the 1947 memorandum of Judge Parker to the district and circuit judges (Appendix, pp. 167–173). All of these documents speak of the proposed legislation as being primarily addressed to the problems presented by trials of fact "dehors the record".

In the third place, respondent's theory is totally at variance with the express recognition in the Judicial Conference materials that the prisoner could and should be produced in the sentencing court in appropriate cases. Judge Stone's memorandum to the chairman of the congressional committees, quoted at pp. 27–29 of our main Brief, is absolutely explicit as to this. He weighs the relative disadvantages of transporting the prisoner to the motion court or the witnesses to the habeas corpus court, and concludes, contrary to the view advanced by respondent (Resp. Br., p. 44), that the former would be the generally preferable procedure. This statement would be meaningless if the prisoner could not be produced.

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Respondent (Br. p. 18) seeks to minimize Judge Stone's memorandum on the ground that it was not submitted to the Judicial Conference or to the Habeas Corpus Committee of the Conference and was not repeated by Judge Parker when he subsequently submitted the bill to all the federal judges for comment (App., pp. 159–173). But Judge Stone was acting at the direction of the Conference on its behalf (Appendix, p. 120), and was undoubtedly fully familiar with the proceedings before and the views of the Conference which he was representing. His statement, moreover, was edited and approved by Chief Justice Stone, the Chairman of the Conference (*id.*, 121). In any event and of even greater consequence, the statement was prepared at the behest of and for the use of the Congressional Judiciary Committees, which were considering the legislation (*id.*, 120–121). In construing this legislation, the intention of Congress is, of course, the primary concern; the understanding of the Judicial Conference is significant to the extent that it may be assumed that Congress relied upon and adopted it.[3] So far as appears, Judge Stone's statement was the principal and final report submitted by the Judi-

[3] This Court has recognized the relevance of the views of the Judicial Conference in interpreting the habeas corpus provisions of the 1948 codification. *Darr* v. *Burford*, 339 U. S. 200, 212–213.

cial Conference to the Congressional Committees.[4] Indeed, the only other report available to the Congress was the earlier letter of transmittal by Mr. Chandler, which similarly gave as an example of a case in which relief by motion would be impracticable the case of a "dangerous prisoner" confined thousands of miles from the district (Appendix, p. 113; see main Brief, pp. 29–30), thus clearly implying that production of the prisoner was contemplated in those cases which did not present unusual danger of escape.

Nothing in the prior or subsequent reports of the Habeas Corpus Committee is in any way inconsistent with the views thus expressed by Judge Stone and Mr. Chandler, and certainly nothing purports to disavow those views. On the contrary, the entire tenor of the reports and memoranda, as we have indicated, was that the motion remedy should be resorted to in cases presenting factual issues and that habeas corpus should be permitted only in rare cases. To the extent that production of the prisoner is necessary to effectuate that result, it seems clear that the

[4] Although the bill ultimately was submitted to Congress by the Revisers of Title 28, their work was reported through the same two committees as received Judge Stone's memorandum, and it must be assumed that they had access to the material submitted by those committees.

Conference and its Habeas Corpus Committee contemplated that he should be produced.[5]

B. Section 2255 provides an adequate remedy

The legal theory upon which respondent and the court below would hold the Act inapplicable to cases requiring a factual hearing when the prisoner is confined outside the district is that in such cases the motion remedy is necessarily and inevitably "inadequate or ineffective." So to construe those words would, as we have seen, be directly contrary to the purpose of § 2255 and the intention of those who sponsored it.

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[5] It is true that it was frequently stated that § 2255 was modeled on the writ of *coram nobis* and that the cases cited by respondent (Br. p. 12) show that in the federal courts a prisoner's presence has not been *required* when relief akin to that available under that writ was sought. Contra: *People* v. *Richetti*, 302 N. Y. 290, 97 N. E. 2d 908 (1951) and cases cited. But these cases do not suggest that the prisoner may not be brought to court in appropriate cases in the exercise of the court's judicial discretion. Compare *McDonald* v. *Moinet*, 139 F. 2d 939 (C. A. 6); *Downey* v. *United States*, 91 F. 2d 223 (C. A. D. C.) in which writs *ad prosequendum* issued to prisoners outside the district. Moreover, the Conference recognized that the proposed remedy was "in the nature of, but much broader than, *coram nobis*" (Judge Stone's memorandum, App. p. 137). In any event, an argument founded upon (a) speculation that by these general references to *coram nobis* the Conference meant to make applicable to the new statute all details of the former *coram nobis* procedure, and (b) further speculation as to the understanding of the Conference as to the right of the prisoner to be present on *coram nobis*, cannot outweigh the very explicit statements quoted above which show beyond question the understanding that under the new statute the prisoner could be produced when appropriate.

In any event, the remedy by motion is not inadequate and ineffective in cases of the sort we are considering. The factors which refute respondent's contentions as to the inadequacy of the motion also, of course, demonstrate that even to make it a complete substitute for habeas corpus—which the statute does not—would not be unconstitutional.

Before discussing the alleged inadequacies of § 2255 in detail, a more generalized statement of what we think the section means may be helpful.

Congress and the Judicial Conference undoubtedly intended § 2255 to be a substitute for habeas corpus when it provided an adequate remedy and assumed that in most, if not all cases, it did provide an equivalent and equally fair procedure. Since it was assumed that the remedy would ordinally be adequate, resort to the motion was not to be merely an additional step to be taken before seeking habeas corpus. The motion was both a substitute and a prerequisite to the writ—a substitute except in the rare cases in which it would not be adequate or effective.

The section provides that where the motion cannot be determined "*conclusively*" upon the pleadings, files and records, the court shall "grant a prompt hearing thereon." The word "hearing" obviously means a *fair* hearing. Cf. *Morgan* v. *United States*, 298 U. S. 468, 480. Certainly this must be true in a statute drafted by the Judiciary. When a hearing will not be

fair without the presence of the prisoner, either to testify or for purposes of preparation, the prisoner has a right—by necessary implication from § 2253 itself—to be present.

The provision in the section that "a court may entertain and determine such motion without requiring the production of the prisoner at the hearing" is not at all inconsistent with such an interpretation. The quoted provision does not say that a prisoner never shall be present, but merely that the prisoner need not always be present. A "hearing" is required under the statute even when only points of law are presented or when factual issues are determinable from files and records, so long as it does not "conclusively" appear that the prisoner is entitled to no relief; but such a hearing would only be a legal argument at which the prisoner's presence would be unnecessary. Cf. *Walker* v. *Johnston* 312 U. S. 275, 284–285. In some cases calling for a trial of facts a court may also reasonably find that the prisoner's presence is not necessary to a fair hearing.* The provision that the court is not required to have the prisoner produced covers such situations, and that was almost certainly its pur-

* Thus a motion might allege that the testimony of A, B, and C, not including the prisoner, would show that the district attorney had knowingly relied on false testimony. If the prisoner had no personal knowledge of the matter and was properly represented by counsel who could produce A, B, and C as witnesses, the prisoner's presence would not seem necessary to a fair hearing.

pose. It can hardly be read as meaning that even when the prisoner's presence is necessary to a fair hearing, the motion court can not require his presence but must proceed without him. Such a construction would permit that provision, inserted by the Revisers in the bill without comment, to nullify, as to cases involving disputed issues of fact not determinable on the record, the fundamental provision for a hearing contained in every draft of the section. And it was such cases that the Judicial Conference had particularly in mind. See pp. 4–5 *supra*. In many such cases the prisoner's presence as a witness or for purposes of preparation might be indispensable in order to make the hearing fair.

1. *A prisoner confined without the district may be produced when his presence is necessary to a fair trial.*

Respondent's principal contention is that the prisoner cannot be produced, even when his presence is necessary to a fair trial, when he is confined without the district. That point has been covered in our main Brief, pp. 32–44, 52–58, and only a few additional observations seem necessary.

a. Respondent has noted that a provision for nation-wide process was included in one of the bills submitted to Congress by the Judicial Conference (H. R. 6723, 79th Cong., 2d Sess., Resp. Br., pp. 51–52, Government's Brief, Appendix, pp. 181–182), but was subsequently omitted.

Since neither the provision nor its omission are referred to at any stage of the history of the legislation, the reason for its elimination is, of course, entirely conjectural. The provision may well have been deemed unnecessary in view of what we think it fair to say has been the general understanding of judges (apart from the majority below) that writs of habeas corpus *ad testificandum* and *ad prosequendum* would run to a prisoner outside the district. Certainly the assumption of the Judicial Conference, as expressed in Judge Stone's memorandum[7] and elsewhere, was that the prisoner could be produced, for otherwise there would have been no point to the extended discussion of the comparative disadvantages of transporting the prisoner in one direction or the court officials in the other. (See pp. 5–7, *supra*.) Since no such provision was contained in any of the other drafts submitted by the Judicial Conference or in the bill as enacted, it seems clear that the omission of the provision cannot be regarded as a manifestation of intention contrary to the expressed understanding of the Conference.

b. We have shown that *Ahrens* v. *Clark*, 335 U. S. 188, is inapplicable to writs issued as ancillary process in cases in which the court already has jurisdiction (Government's main Brief, pp.

[7] That memorandum was addressed to S. 1451 and S. 1452 (see Appendix, p. 126), the bills originally submitted by the Conference in 1944 (see Government's main brief, p. 19; Appendix, pp. 115–120).

39–41). Respondent counters with habeas corpus cases held moot because the prisoner and custodian are no longer within the district. *United States ex rel. Innes* v. *Crystal*, 319 U. S. 755; cf. *Ex parte Endo*, 323 U. S. 283, 304–307. But in the absence of such persons the court no longer has the power over any defendant which is essential to the entry of a judgment in a habeas corpus case, and accordingly has no jurisdiction in the case at all. Here the court issuing a writ *ad testificandum* or *ad prosequendum* has unquestioned jurisdiction over the main proceeding before it, and over both parties, the United States and the prisoner, who is confined pursuant to the court's judgment, and Section 2255 itself gives the court power to enter a judgment binding upon the parties whether or not any of them are within the district. The writs *ad testificandum* and *ad prosequendum* are therefore available as auxiliary or ancillary writs in a case over which the court retains jurisdiction.

c. Respondent also argues (Br., pp. 24–26) that if the presence of the prisoner is dependent upon the discretion of the Government or of the motion court, the procedure gives the prisoner an inadequate remedy. We have not asserted that the prisoner's remedy is adequate because the Department of Justice as a matter of grace may be willing to produce him, but because the court has power to issue a writ for the production of the prisoner when necessary to give the prisoner

a fair hearing. Apart from its practical importance in showing that the prisoner's presence can, in fact, be secured, the practice of the Department in invariably honoring writs *ad testificandum* and *ad prosequendum* for the producion of prisoners confined outside the District is a relevant factor in determining the construction of the all-writs statute. The consistent and uniform interpretation of a statute by an affected executive agency—even one not charged with its administration—is entitled to some weight, particularly, or at least, when such a construction may be thought to be adverse to the agency's specialized interest in protecting the public safety by maintaining prisoners in custody.

It is urged that since the motion court exercises a discretionary authority in ordering the production of the prisoner, the remedy must be deemed inadequate. But as the Tenth Circuit sitting *en banc* declared in *Barrett* v. *Hunter*, 180 F. 2d 510, 514, quoted in our main Brief at pages 53–54, the motion court does not act at large; it must exercise a sound judicial discretion. And the test, as we have seen (pp. 9–10 *supra*), is whether the prisoner's presence is necessary to a fair hearing—certainly not a standard which courts should be unable to administer. Any uncertainty as to what is required under the motion, as a result of its newness and the absence of any authoritative pronouncement by this Court, may well

disappear after this Court's decision in this case. In view of the fact that many courts have caused the prisoner to be produced, the remedy cannot be characterized as necessarily inadequate.

It is true that, as in this case, a district court may erroneously proceed in the prisoner's absence, and that correction of the error by appeal will take time. But all litigation, habeas corpus included, is subject to that kind of risk. In so far as this respondent is concerned, his case will not be speeded up nor aided in any other way by requiring him to proceed by writ in San Francisco rather than by motion in Los Angeles, where he asked to be heard.

2. *The motion procedure does not deprive the prisoner of his right to a speedy determination*

Respondent asserts (Br. 40–41) that the motion remedy deprives a prisoner of the speedy determination of his rights obtainable at habeas corpus. In our main brief (p. 58) we have stated that the requirement of a "prompt hearing" in Section 2255 is a sufficient substitute for the time schedule prescribed for habeas corpus cases in Section 2243. That section provides that the return to the writ shall be submitted "within three days unless for good cause additional time, not exceeding twenty days, is allowed." The rules of a number of district courts require that answers to motions

be filed within five days;[8] since the answer to the motion is equivalent to the return to the writ, it can be seen that the time schedule in this respect will not be substantially different. Section 2243 also provides "when the writ or order is returned a day shall be set for hearing, not more than five days after the return *unless for good cause additional time is allowed.*" The italicized clause shows that the time schedule for a habeas corpus hearing is sufficiently flexible so as not, in substance, to differ from the requirement for a "prompt hearing" contained in Section 2255.

Federal judges are doubtless aware that the motion under Section 2255 is a substitute for the Great Writ, and that a person's liberty may depend upon the prompt disposition required by the statute. It should be assumed that they will accord prisoners speedy relief under the motion unless some insuperable obstacle thereto clearly appears.[9]

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[8] *E. g.* Rules of the United States District Courts: Southern District of California, Rule 3 (d); District of Columbia, Rule 9; Eastern District of Missouri, Rule 8; see Northern District of California, Rule 3, and Northern District of Illinois, Rule 6.

[9] The reference in respondent's brief to the time which it has taken respondent to secure an adequate hearing seemingly attributes the delay to the inadequacy of the motion procedure. But it should be noted that the final order of the district court was entered less than a month after the filing of respondent's motion (R. 1, 13), and that the notice of appeal was filed two weeks later (R. 17). The first decision of the court of appeals was handed down sixteen months later (R. 22). This delay is hardly the fault of the motion procedure prescribed in Section 2255.

The exceedingly helpful though admittedly incomplete statistical data[10] furnished to counsel by the Administrative Office of the United States Courts do not reveal any major discrepancy in the speed with which writs and motions are disposed of. The statistics show that for all writs the median time before termination of the proceeding in the district court was .9 months for 1948–1949, 1.1 months for 1949-1950, and .4[10a] months for 1950–1951, whereas the corresponding time for motions was 1.6, .8, and 1.1 months for the same years. For cases terminated after trial, the median time for writs was 1.6, 1.6, and 1.4 months for the three years respectively; for motions the incomplete data showed that one-half of the 12 cases listed were disposed of in less than two months. With respect to both writs and motions, there were cases which were not disposed of promptly; over the three-year period, 37 habeas corpus cases (2.7%) were not terminated within twelve months, whereas the same was true of apparently 7 (2.5%) of the much smaller number of motions. These figures prove only that there is no basis for assuming or holding that the motion procedure will be so much slower than habeas corpus as to warrant holding it an inadequate substitute.

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[10] These figures which are, of course, available to the Court, bring up to date and amplify the data in Speck, *Statistics on Federal Habeas Corpus*, 10 Ohio State L. J. 337 (1949), cited in *Darr* v. *Burford*, 339 U. S. 200, 233 (dissent).

[10a] It may be surmised that the sudden decrease in the time required for habeas corpus cases may be due to the dismissals for failure to follow the procedure prescribed by Section 2255.

3. Provisions as to bail

Respondent argues (Br., p. 41) that the motion procedure is inadequate because there is no provision for bail on appeal similar to that for habeas corpus under Supreme Court Rule 45. Under the Rule a prisoner refused a writ shall not be granted bail, while a prisoner discharged may be released in recognizance, with or without surety, pending appeal (Rule 45 (1) and (3)). The same would doubtless be true on a motion, despite the lack of a specific rule to that effect. Rule 45 (2) provides that where a writ of habeas corpus issues but has been discharged, the prisoner may be remanded to custody or released on bail. The absence of a similar provision for a prisoner denied relief under a motion hardly makes the procedure legally inadequate.

4. Privileges in forma pauperis

Respondent argues (Br., p. 41) that fees for transcripts are paid by the United States for persons proceeding *in forma pauperis* in "criminal or habeas corpus proceedings" under Section 753 (f), 28 U. S. C., but that there is no such provision for persons proceeding under Section 2255. We think it probable that the motion would be regarded as a "criminal" proceeding for purposes of Section 753 (f), if that were necessary. But Section 1915 (b) provides that:

> In any civil or criminal case the court may, upon the filing of a like affidavit, di-

> rect that the expense of furnishing a stenographic transcript and printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

This section clearly permits the obtaining of records *in forma pauperis* in all types of cases. Certainly it cannot be assumed that the courts or the Administrative Office will make a distinction between persons proceeding under Section 2255 and persons seeking the same relief by way of habeas corpus in so far as obtaining transcripts or other documents at Government expense is concerned.

5. *The writ and the motion do not differ in respect to their finality*

It is objected that Section 2255 establishes stricter standards of finality than apply to habeas corpus under Section 2244. While not denying that neither section makes a ruling *res judicata* (see Government's main Brief, pp. 84–85), respondent relies on the fact that while both sections declare that the court "shall not be required" to entertain a second petition for similar relief, only Section 2244 contains the clause conditioning denial on a finding that "the judge or court is satisfied that the ends of justice will not be served by such inquiry." The absence of

such a provision in Section 2255 does not mean that the courts will apply a more rigid standard; in the absence of any statutory limitation, the quoted clause would seem to set forth the standard which they would be expected to apply. Section 2244 may have been made more specific in this respect because the Reviser's bill contained a mandatory provision embodying the principles of *res judicata*. See S. Rep. 1559, 80th Cong., 2d Sess., p. 9. The section was objected to by the Conference because of that provision (*id*; Appendix, pp. 154–159, 183–184), and accordingly was rewritten by the Senate Committee in accordance with the Conference's recommendations. S. Rep. 1559, *supra*. The corresponding provision in Section 2255, which did not establish the doctrine of *res judicata*, but merely made applicable the principle of *Salinger* v. *Loisel*, 265 U. S. 224, was inserted by the Revisers without comment and accepted without objection by the Conference.

We do not mean to suggest that a remedy by motion would be legally inadequate or ineffective or unconstitutional if it were governed by the principle of *res judicata*. The contrary seems clearly true. See *Barrett* v. *Hunter*, 180 F. 2d 510, at 516 (C. A. 10). Historically, habeas corpus decisions were not appealable and there was good reason for not making the decision of a single judge absolutely binding. Now that habeas corpus decisions are subject to "the cleansing bath of appellate review," there is certainly no

fundamental reason—at least none of constitutional stature—for adherence to the ancient doctrine,[11] even though there may be considerations of policy which support a less restrictive rule such as has been approved by this Court (*Salinger* v. *Loisel*, 265 U. S. 224) and by the Judicial Conference and Congress in Sections 2244 and 2255.

II

The constitutionality of section 2255

The Government's main brief asserted that at the time the Constitution was adopted, and up until the Act of 1867, habeas corpus was not available as a remedy after conviction, once the jurisdiction of the court over criminal matters—which means, of course, over the kind of case in issue—was shown; we had thought that so axiomatic that the mere citation of leading cases was sufficient to establish it (Government Br., p. 75). This limitation upon the historical scope of the writ suggested that, even if Section 2255 be regarded as a curtailment of the right to the writ as expanded by the 1867 statute—which it was not intended to be, and which for reasons already set forth we think it clearly is not—it would not be a contraction of the writ protected by the Constitution. Respondent seems to challenge the universal assumption as to the historical limitation upon the

[11] See Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 Harv. L. Rev. 657, 669–670 (1948).

writ as applied to convicted criminals, largely upon the basis of a "misplaced parenthesis" (Resp. Br., p. 31) in the Government's version of the Habeas Corpus Act of 1679.

Although the historical approach, which we confess to having interjected into the case, has its fascinations, it must be examined in proper perspective. It is our position that Section 2255 is an appropriate and reasonable exercise of the power of Congress to regulate habeas corpus procedure—a power which necessarily includes authority to modify that procedure in substantial respects so long as the essential protection accorded by the Great Writ is not impaired. For reasons already stated (pp. 9–20, *supra*), we believe that Section 2255 does not in any way deprive the prisoner of rights previously accorded him by way of habeas corpus, even if it be regarded as a complete substitute for the writ. And, in any event, since the writ remains available whenever the motion procedure proves an inadequate or ineffective remedy, Section 2255 does not constitute a suspension of the writ even if it were regarded as granting the prisoner substantially less protection.

Our reliance upon history was to show that if all of the above arguments are found wanting, and if Section 2255 were held to provide a less effective remedy than does the present statutory writ of habeas corpus, it would, nevertheless, be

plainly constitutional, since it provides greater protection than the writ of habeas corpus known to the common law, known to England, known to the framers of the Constitution, and known to this Court prior to the statutory enlargement of 1867. The premise of this argument is that the historical writ was not available to prisoners convicted by courts of competent jurisdiction.

A. The cases in this Court

Although this Court will doubtless be anxious to know who misplaced the parenthesis in the Act of 1679, it will probably and properly be guided to a considerably greater extent by its own uniform line of decisions as to the original scope of habeas corpus available to convicted prisoners. Accordingly, before embarking on the historical excursion, we shall call attention somewhat more elaborately than in our main brief to what this Court has said.

Perhaps the most recent summary of the prior law is contained in *Frank* v. *Mangum*, 237 U. S. 309, 330, wherein this Court said:

> The rule at the common law, and under the act 31 Car. II, c. 2, and other acts of Parliament prior to that of July 1, 1816 (56 Geo. III, c. 100, § 3), seems to have been that a showing in the return to a writ of *habeas corpus* that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry. So it was held,

under the judiciary act of 1789 (ch. 20, § 14, 1 Stat. 73, 81), in *Ex parte Watkins*, 3 Pet. 193, 202. And the rule seems to have been the same under the act of March 2, 1833 (ch. 57, § 7, 4 Stat. 632, 634), and that of Aug. 29, 1842 (ch. 257, 5 Stat. 539).

In *Ex parte Watkins*, 3 Pet. 193, one of the leading early cases, the Court stated, speaking through Chief Justice Marshall (p. 202):

> * * * the celebrated *habeas corpus* act of the 31 Car. II. was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to, as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit, persons commited for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution. The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of *habas corpus?*

In *Ex parte Yerger*, 8 Wall. 85, 101, the Court stated:

> As limited by the act of 1789, it [habeas corpus] did not extend to cases of impris-

> onment after conviction, under sentences of competent tribunals; * * *

Again in *Ex parte Parks*, 93 U. S. 18, 21–23, after referring to a number of English authorities, the Court stated (p. 22):

> These extracts are sufficient to show, that, when a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of course, a superior court will interfere if the inferior court had exceeded its jurisdiction, or was not competent to act.

In *Ex parte Siebold*, 100 U. S. 371, 375–6, cited by respondent, the Court stated that (p. 375):

> The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

And *Ex parte Yarbrough*, 110 U. S. 651, states with respect to the use of the writ for convicted prisoners (pp. 653–654):

> * * * if that court had jurisdiction of the party and of the offence for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further.

Other cases stating the general rule are cited in the note below.[12]

The English cases cited by respondent (p. 34) cannot be said to stand for any broader proposition. A number of cases describe the English law as permitting habeas corpus after conviction only to test the jurisdiction of the trial court. *Rex* v. *Lewes Prison (Governor)*, 1917, 2 K. B. 254; *King* v. *Suddis*, 1 East 306 (1801); *King* v. *Taylor*, 7 Dow. & Ry., 622 (1826). As in the United States, in some cases "jurisdiction" seems to be construed narrowly (*In the Matter of Newton*, 16 C. B. (7 J. Scott) 96 (1855); *Ex parte Lees*, El. B. & E. 828 (1858)) and in others broadly (*Souden's Case*, 4 B. & Ald. 294 (1821)). *Bushell's Case*, Vaughan 135, 6 St. Tr. 231 (1670) can be classified as one in which jurisdiction was lacking because there was no such offense, thus rendering the proceeding void. *In re Authers*, 22 Q. B. D. 345 (1889), was a case in which the sentence was beyond the jurisdiction of the sentencing court.

The enlargement of the concept of jurisdiction in recent years has found statutory basis in the language of the Act of 1867 (see Government's

[12] *Johnson* v. *Zerbst*, 314 U. S. 458, 466; *Ex parte Kearney*, 7 Wheat. 38, 42–43; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Rowland*, 104 U. S. 604, 612; *Ex parte Mason*, 105 U. S. 696, 697; *Ex parte Curtis*, 106 U. S. 371, 375; *Ex parte Wilson*, 114 U. S. 417, 420–421; *Ex parte Harding*, 120 U. S. 782, 783–784; *In re Schneider (No. 2)*, 148 U. S. 162, 166.

main brief, pp. 76–79), although it is true that many of the cases do not refer to the statute. But in none of the early cases would this Court permit a challenge to a conviction by a court acting within its jurisdiction on the basis of facts dehors the record. See also the statement of the Committee of the Judicial Conference (Appendix, p. 88).

B. The act of 1679 and the possibly misplaced parenthesis

The argument in our main brief that convictions in criminal cases could not be set aside on habeas corpus rested in part on the exception for convicts in the Habeas Corpus Act of 1679, 31 Car. II, c. 2, which seems to have been generally recognized as the foundation upon which rests both the English and American law of habeas corpus with respect to criminal matters.[13] Respondent has asserted, however (Br. pp. 30–32), that that exception merely left convicted prisoners to the common law of habeas corpus without the benefit of any of the rights accorded by the 1679 statute. Examination of the authoritative commentators upon the meaning and effect of the 1679 Act discloses that, although they did not advert to the precise question, they all treated the Act as codifying the entire law of habeas corpus in so far as it related to "criminal or sup-

[13] See *Frank*, *Watkins*, and *Parks*, cases quoted at pp. 23–25, *supra*, and authorities cited at pp. 28 and 32, *infra*.

posed criminal matters",[14] a phrase frequently used in the statute itself to show what it intended to cover. See Sections I, II, IX. These commentators nowhere imply that the Act left such an important problem as the rights of convicted prisoners "to the vagaries of the common law procedure".[15]

It is true, however, that the American and English cases referred to above, holding that where there is lack of jurisdiction habeas corpus may be available to convicted prisoners, do seem to go beyond the rights granted by the 1679 Act. But they do not hold or suggest—prior to the 1867 Act of Congress—that a conviction may be set aside for violation of procedural rights in the course of the trial or that evidence dehors the record may be taken to determine whether any such violation occurred. Since the writ guaranteed by the Constitution afforded much less protection than Section 2255, the latter can hardly be deemed an unconstitutional suspension.

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[14] Wilmott's Notes of Opinions and Judgments, *Opinion on the Writ of Habeas Corpus* (1758), 77–129, see especially 85–86, 89, 105; 9 Holdsworth, *History of English Law* (1926), 110–125; Dicey, *Law of the Constitution* (1939), pp. 216–219. Hurd, *Habeas Corpus* (2d ed., 1876) 199, states:

"The common law writ of habeas corpus, as has been observed, was not taken away by the act of 31 Car. II; but was left wholly untouched by it in all cases where the detainer was not for criminal or supposed criminal matter."

[15] "The effect was to leave what may be termed *civil detentions* to the vagaries of the common law procedure." Cohen, *Habeas Corpus Cum Causa*, 18 Can. Bar Rev. 172, 186 (1940).

Although the point seems to us to be of no importance, we think it appropriate to comment on respondent's suggestion that in construing the 1679 Act we were misled by a "misplaced parenthesis". Section III of the 1679 Act permits persons "committed or detained" for any crime "*other than persons convict or in execution* by legal process or any one on his or their behalf" (parentheses omitted, italics supplied) to apply for writs of habeas corpus. Respondent places parentheses around the italicized words alone, whereas the Government's brief also included the following phrase "by legal process". But whether that phrase modifies "committed or detained" or "persons convict or in execution", the statute clearly exempts persons convicted of crime from its provisions. We do not think the placement of the parenthesis proves anything one way or the other as to whether such persons remained entitled to a broader common law writ. Unquestionably, the 1679 Act applied only to persons *committed* "by legal process" for it was concerned only with criminal or supposed criminal matters, and not with private restraints. The reference to persons "convict or in execution" also obviously covers persons convicted "by legal process"; by which clearly was meant not persons convicted legally but convicted by the process of law. Thus, there would be no difference in meaning wherever the parenthesis be placed. In any event, the English did not take their parentheses that seriously; indeed, it has been stated

by reputable authorities that "the words as they stand in the Rolls of Parliament are never punctuated".[16]

Nevertheless, respondent believes that the placement of the closing parenthesis has some significance, and respondent asserts that there has been "a curious misreading of the Act by early state legislators in this country, shared by certain commentators and the Government in the present case" (Br. p. 31):

Respondent relies upon the *Statutes of the Realm*, the pertinent volume of which was first pub-

[16] Hardcastle, *A Treatise on the Construction and Effect of Statutory Law* (London, 1879), p. 96. See also *Barrow* v. *Wadkin*, 24 Beav. 327, 330: "I supposed I should not learn much on the subject from the inspection of the Roll of Parliament; but, as it was in my custody, I have examined it, * * * It seems that in the Rolls of Parliament the words are never punctuated, and accordingly very little is to be learnt from this document" (Romilly, M. R.). *Doe* v. *Martin*, 4 D. & E. 39, 65–70 (1790): "We know that no stops are ever inserted in acts of parliament." *Duke of Devonshire* v. *O'Connor*, 24 Q. B. D. 468, 478 (1890): "To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops." *Rex* v. *Casement*, 1917, 1 K. B. 98, 123: "Now I repeat what I said during the argument, that we must construe these words of this statute, now some 560 years old, without reference to commas or brackets, but merely looking to the language." 2 Sutherland, *Statutory Construction* (3d ed., 1943), pp. 476–7: "Parliamentary enactments originally were not punctuated and thus it was a necessary conclusion that the punctuation subsequently inserted was no part of the act." See also 31 *Halsbury's Laws of England* (2d ed., 1938), p. 465.

lished in 1819, as containing the authentic text of the Act of 1679. This edition of the English statutes, which puts the closing parenthesis *before* "by legal process", as respondent asserts, is regarded as official and authoritative, and its version of the 1679 Act has been followed in subsequent compilations of English laws.[17] Prior to this edition, however, "no authoritative edition of the statutes was obtainable".[18] Of the nine earlier editions of the English statutes printed between 1679 and 1819 found in the Library of Congress, seven (including the only two contained in the libraries of this Court and of the Department of Justice) placed the paren-

[17] E. g., 6 Hals. Statutes of England, 86 (2d Ed. 1948); 1 *The Statutes*, 413 (3d Rev. Ed. 1950); 5 *The Complete Statutes of England*, 84 (1929). With respect to the accuracy of the *Statutes of the Realm*, see Winfield, *The Chief Sources of English Legal History* (1925), 92, as follows:

That, on the whole, the work was done well, is undeniable. That it should have been perfect no reasonable human being could expect. That it might have been much better than it actually was, without making impossible demands on the editors, is an unfortunate fact. Perhaps the early twentieth century plumes itself too much on meticulous accuracy in small fields of research to sympathize with the partial success of the early nineteenth century in far wider regions. At any rate, every word of *Statutes of the Realm* cannot be taken as canonical. The Commissioners made mistakes in transcription, they blundered badly occasionally in translation, their dates are not always accurate, their evaluation of sources leaves something to be desired, and such as it is, they do not consistently adhere to it.

[18] *Id.*, at 90.

thesis *after* "by legal process" rather than before.[19] The "certain commentators" who shared the Government's misapprehension as to the placement of the parenthesis include not only this Court (*Ex parte Parks*, 93 U. S. 18, 21),[20] but many authoritative works on the subject (3 Blackstone *Comm.* 136 (1803 ed.); 4 Bacon's *Abridgment of the Law* 577 (1852 ed.); 2 Hawkins, *Pleas of the Crown*, 145 (6th ed. 1787); 9 Holdsworth, *A History of English Law* 118 (1926); Church, *Habeas Corpus* 50 (2d ed. 1893); Hurd, *Habeas Corpus* 640 (2d ed. 1876); Cohen, *Habeas Corpus Cum Causa*, 18 Can. B. Rev. 172, 187 (1940)), and the legislatures in 12 states which have laws modeled on the Act of 1679 (Del. Laws (1797 ed.), c. IV. Md. Laws (1811 ed.), c. 125; Mass. Laws, 1784, c. 72; Mich. Rev. Laws 1827, p. 215; N. J. Laws 1795, c. d. (1797 ed.) xxxvi; N. H. Laws 1815, c. 45; N. Y. Laws

[19] Parenthesis before: rare edition of the Act, apparently printed in 1679, in Library of Congress compilation of separate laws (now in Miss Newman's office), and 2 *Statutes at Large* 1489 (Keble 1695). Parenthesis after: 2 Cay's *Statutes at Large* 856 (1758); 3 *Statutes at Large* 398 (Basket, printer 1763); 8 *Statutes at Large* 433 (Pickering ed. 1763); 3 *Statutes at Large* 398 (Ruffhead ed. 1770); 3 *Statutes at Large* 375 (Eyre, printer 1786); 3 *Statutes at Large* 233 (Raithby ed. 1811); 5 *Statutes at Large* 459 (Raithby reprint 1811). Pickering and Tomlins & Raithby have been described as "the favourite editions". Carswell, *Guide to Law Reports and Statutes* (2d ed., London, 1948).

[20] "The Habeas Corpus Act itself excepts those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process. Com. Dig., Hab. Corp. B." 93 U. S. at 21.

1787, c. 39; id. 1801, c. 65; id. 1818, c. 277; N. C. Rev. Stats. 1837, c. 55; Ohio Laws 1831, p. 164; R. I. Rev. Stats, 1857, c. 201; 1 S. C. Stats. at Large (1837 ed.), p. 117; 2 *id.*, p. 401; Virg. Comp. Laws 1776–1807, c. 118).

In this case the punctuation of the British statute is relevant only by reason of its effect upon the understanding of "habeas corpus" when the Constitution of the United States was adopted. Unquestionably, during the entire 18th Century and for some time thereafter it was assumed both by English and American authorities that the parenthesis came after the phrase "by legal process". If there be any difference in legal effect, which we doubt, the version of the British Act familiar to the framers of the Constitution must control.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

ROBERT L. STERN,
JAMES L. MORRISSON,
Special Assistants to the Attorney General.

REX A. COLLINGS, JR.,
Attorney.

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ADDENDUM TO APPENDIX II

Since the filing of the Government's main brief, responses to the questionnaire have been received from six additional United States Attorneys. Three recited that they had no cases under Section 2255, and one that the only case raised a question of law, which was determined by the court in favor of the prisoner without his being present. The replies from the District of New Jersey and the Middle District of Tennessee stated that in each district prisoners had been produced from outside the district through the use of the writ of habeas corpus *ad testificandum*. The letter from the United States Attorney for the Middle District of Tennessee states:

> In cases in our District in which a motion under Section 2255 raises issues of fact which cannot be conclusively resolved from the files and records of the case, it has been customary to resolve these issues with testimony in Open Court, the prisoner having a right to be present as a witness and otherwise. Counsel is always appointed for the petitioner in the event he is unable to employ counsel of his choice. Petitioner is always brought before the Court on a writ of habeas corpus ad testificandum, which is dated a few days prior to the date of hearing in order to give the prisoner adequate opportunity to consult with counsel. In the event either the attorney or the prisoner makes allegations as to inadequacy of time for preparation, the matter is passed a few days in order to give counsel and prisoner time to confer and prepare.

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